No. 3437

United States
Circuit Court of Appeals
For the Ninth Circuit

NEW CORNELIA COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

IGNACIO S. ESPINOSA, as Administrator of the Estate of JOSE MARIA OCHOA, Deceased,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court of the District of Arizona.

MR. CLEON T. KNAPP, of Bisbee, Arizona,
MESSRS. BOYLE & PICKETT, of Douglas, Ariz.
Attorneys for Plaintiff in Error.

Filed this 1920

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Clerk U. S. District Court of Appeals,
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Service of two copies of within Brief of Plaintiff in Error is hereby acknowledged this.....
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Attorneys for Defendant in Error.

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STATEMENT OF CASE.

Defendant in Error, as administrator of the estate of Jose Maria Ochoa, deceased, instituted this action in the Superior Court of Pima County, Arizona, against Plaintiff in Error, to recover for the death of the deceased. Plaintiff in Error, in the usual course, removed the cause to the United States District Court for the District of Arizona, at Tucson.

The complaint set up two separate causes of action for this death of said deceased. The first of such causes of action so pleaded, being that certain action provided by and existing under the provisions of Chapter Six, of Title Fourteen, Revised Statutes of Arizona, 1913, known as "THE EM-

PLOYERS' LIABILITY LAW OF ARIZONA" and the second of such causes of action so pleaded, being the usual and ordinary action existing in the absence of a particular statutory action therefor. for wrongful death due to negligence of the defendant.

Whereupon, on this state of the complaint, plaintiff in error moved that defendant in error be required to elect between the two said causes of action thus pleaded in the complaint (transcript p. 22) and upon hearing thereon, the Court granted said motion and defendant in error thereupon elected to proceed upon the said first cause of action pleaded in his complaint, being that existing and provided under the said provisions of said The Employers' Liability Law of Arizona (transcript p. 27).

The cause was tried to a jury (transcript p. 30) and at the close of the defendant in error's case, plaintiff in error moved the Court to direct the jury to return its verdict in favor of plaintiff in error, which motion was by the Court denied, to which ruling plaintiff in error duly excepted and the exception was allowed (transcript pp. 42, 43, 44, 45.) Plaintiff in error thereupon introduced its evidence and rested and at the close of all the evidence taken in the cause, again moved the Court to direct the jury to return its verdict in favor of plaintiff in error, which motion was by the Court denied, to which ruling exception was duly taken and allowed (transcript pp. 50, 52, 53).

The jury returned a verdict for defendant in

error in the sum of $10,000.00, (transcript p. 31), whereupon plaintiff in error moved that the verdict be set aside, which motion was by the Court denied and an exception to such ruling was duly taken and allowed. Plaintiff in Error thereupon moved for judgment notwithstanding the verdict, which motion was by the Court denied and an exception to such ruling duly taken and allowed. (Transcript p. 68.)

Judgment was duly entered upon motion therefor, that defendant in error recover said sum of $10,000.00 and his costs, whereupon plaintiff in error moved for a new trial, which motion by the Court was denied (transcript p. 68) and an exception to such ruling duly taken and allowed.

Thereupon, in due course, plaintiff in error proceeded to bring this cause up for review upon Writ of Error.

Specifications of Error

I.

The Court erred in denying motion made by plaintiff in error, when defendant in error had rested, (transcript pp. 42, 43, 44, 45) to direct the jury to return its verdict in favor of plaintiff in error, for the reasons that:

(a) Defendant in error had wholly failed to show that the accident which resulted in the death of the deceased, arose out of, and in the course of, and was due to a condition or conditions of the occu-

pation, employment, work or service in which the deceased was engaged;

(b) Defendant in error had wholly failed to show that the accident which resulted in the death of the deceased, was due to or occasioned by a risk or danger inherent or peculiar in or to the said occupation, employment, work or service in which the deceased was engaged;

(c) Defendant in error had wholly failed to show that the accident which resulted in the death of the deceased was not caused by the negligence of the deceased.

II.

The Court erred in denying motion made by plaintiff in error, when both defendant in error and plaintiff in error had rested, (transcript p. 50) to direct the jury to return its verdict in favor of plaintiff in error, for the reasons that:

(a) Defendant in error had wholly failed to show that the accident which resulted in the death of the deceased, arose out of, and in the course of, and was due to a condition or conditions of the occupation, employment, work or service in which the deceased was engaged;

(b) Defendant in error had wholly failed to show that the accident which resulted in the death of the deceased, was due to or occasioned by a risk or danger inherent or peculiar to or in said occupation, employment, work or service to or in which the deceased was engaged;

(c) Defendant in error had wholly failed to show that the deceased was at work or engaged in his said occupation, or his said employment, work or service, at the time when the said accident occurred to or was sustained by him, which accident resulted in his death;

(d) Defendant in error had wholly failed to show that the said accident which resulted in the death of the deceased, was not caused by the negligence of the deceased;

(e) Defendant in error had wholly failed to show any pecuniary loss or damage whatever;

(f) There was no question of fact presented for the jury to determine.

III.

The Court erred in denying motion made by plaintiff in error, when both defendant in error and plaintiff in error had rested, and after the Court had permitted defendant in error to re-open his case, over objection of plaintiff in error, to introduce testimony as to the life expectancy of the deceased, and the wages earned by deceased at the time of the accident, to direct the jury to return its verdict in favor of plaintiff in error, (transcript pp. 50, 51, 52, 53) for all and singular, the reasons assigned and set out in foregoing Specification of Error II, being matters and things designated therein a, b, c, d, e, and f.

IV.

The Court erred in permitting defendant in er-

ror, over the objection of plaintiff in error, to reopen his case, after both defendant in error and plaintiff in error had rested, and after plaintiff in error had moved the Court to direct the jury to return its verdict in favor of plaintiff in error, for the purpose of introducing testimony as to the life expectancy of the deceased, and as to the wages earned by deceased at the time of the accident. (Transcript pp. 50, 51, 52).

V.

The Court erred in instructing the jury as follows, to-wit:

> "You are further instructed that if you find from the evidence in this case that the plaintiff's intestate, Ochoa, at the time of his death, had gone upon the defendant's property eight or ten minutes before the time to go to work in the mine, and was waiting there for the time to come for him time to go to work in the mine, and was gaged in a hazardous occupation under the Employers' Liability Law, and was rendering work, service and labor for the defendant company, regardless of the fact that he had not yet gone down into the mine to work." (Transcript p. 57).

To which instructions, plaintiff in error duly excepted, which exception was duly allowed (transcript pp. 66, 67).

VI.

The Court erred in instructing the jury as follows, to-wit:

> "It is my opinion that an employee, reg-

> ularly employed in a mine, who a few minutes, say four or five minutes, before the time for entering upon his work, enters upon the property of his employer at a point in close proximity to where he was to work and is waiting for the time to arrive when he should go down into the mine, is rendering work, service or labor for the employer and is engaged in a hazardrous occupation within the meaning of the Employers' Liability Law" (transcript pp 57, 58).

To which instructions, plaintiff in error duly excepted, which exception was duly allowed. (transcript pp. 66, 67).

VII

The Court erred in instructing the jury as follows:, to-wit:

> "I further charge you, as I have previously done, that in my opinion under all the facts and circumstances of this case, that the plaintiff was doing work, service and employment for the defendant company at the time this accident occurred. That is my conclusion from all the facts detailed in this case." (Transcript p. 58).

To which instructions, plaintiff in error duly excepted, which exception was duly allowed. (transcript pp. 66, 67).

VIII.

The Court erred, when, after instructing the jury as follows, to-wit: (transcript pp. 56, 57)

> "Before an employee may recover for injury under the Employers' Liability Act of the State of Arizona, such injury must have occurred while he was at work in

his occupation, and it must have been occasioned by a risk or danger inherent in the occupation. Therefore, if you find that at the time Ochoa received the injury which caused his death, he was not at work in his occupation for the defendant, or if you find that such injury was not occasioned by a risk or danger inherent to such occupation, your verdict must be for the defendant."

AND (transcript p. 57)

"Before an employee may recover for injury under the Employers' Liability Act of the State of Arizona, it must have been due to a condition or conditions of the occupation, and an injury cannot be said to have been due to a condition or conditions of the occupation unless the employee at the time of the injury was rendering work, service or labor for his employer. Therefore, if you find that at the time he received the injury which caused his death, the plaintiff's intestate, Ochoa, was not rendering work, service or labor for defendant, your verdict must be for the defendant."

It qualified the same by stating and further instructing the jury as follows, to-wit: (transcript p. 58)

"So that when I gave you those two charges, which are to the effect that if you find at the time that Ochoa received the injury which caused his death, he was not rendering work, service or labor for the de-defendant, your verdict should be for the defendant, it is with the qualifications which I have just stated."

The qualifications being that if Ochoa—

"Had gone upon the defendant's property eight or ten minutes before the time to go to

work in the mine and was waiting there for the time to come for him to go to work, then the said Ochoa was engaged in a hazardrous occupation under the Employers' Liability Law and was rendering work, service and labor for the defendant company, regardless of the fact that he had not yet gone down into the mine to work." (Transcript p. 57).

AND

"It is my opinion that an employee regularly employed in a mine, who a few minutes, say four or five minutes, before the time for his entering upon his work, entered upon the property of his employer at a point in close proximity to where he was to work, and is waiting for the time to arrive when he should go down into the mine, is rendering work, service or labor for the employer and is engaged in a hazardrous occupation within the meaning of the Employers' Liability Law." (Transcript pp. 57, 58).

To which qualifying of its instructions so given by the Court and said instructions so given and qualified, plaintiff in error duly excepted, which exceptions were duly allowed. (Transcript pp. 65, 66, 67).

IX.

The Court erred in instructing the jury as follows, to-wit:

"Such damages should be computed or estimated by the probable accumulations of a man of the deceased's age, habits of life during his probable lifetime———— You are limited to ascertaining from the evidence in this case, and from the evidence alone, the actual pecuniary loss sustained in

> dollars and cents as near as you can approximate the same and in that amount only can you return a verdict for the plaintiff." (Transcript pp. 61, 62).

To which instructions, plaintiff in error duly excepted, which exception was duly allowed. (transcript p. 67).

X.

The Court erred in instructing the jury as follows, to-wit:

> "In this case the testimony shows that the deceased left surviving him a widow and three or four minor children dependent upon him, and the Employers' Liability Act just quoted provides that the recovery, if any, shall be for the benefit of the widow and minor children." (Transcript p. 61).

To which instructions, plaintiff in error duly excepted, which exception was duly allowed. (transcript p. 67).

XI.

The Court erred in refusing to give the following instruction to the jury, requested by plaintiff in error, to-wit: (transcript p. 66)

> "If you find that the intestate Ochoa in lighting a fire, which fact is uncontradicted, was doing an act outside the duties of his work, service and employment, you must find for the defendant company."

To which refusal of the Court, plaintiff in error duly excepted, which exception was duly allowed. (transcript p. 66).

XII.

The Court erred in refusing to give the following instruction to the jury, requested by plaintiff in error, to-wit: (transcript p. 66)

> "You are instructed that there is no evidence in this case that the powder or dynamite which caused the death of the intestate Ochoa, was ever owned or under the control of the defendant company."

To which refusal of the Court, plaintiff in error duly excepted, which exception was duly allowed. (transcript p. 66).

XIII.

The verdict and the judgment are each and both contrary to law and not sustained or justified by the evidence, by reason of the matters and things all and singular, set forth in foregoing Specifications of Error I-XIII both inclusive.

XIV.

The Court erred in denying the motion of plaintiff in error to set aside the verdict (transcript p. 68) for the reason that the verdict is contrary to the law and not sustained or justified by the evidence by reason of the said matters and things all and singular, set forth in said foregoing Specifications of Error I-XIII both inclusive.

XV.

The Court erred in denying the motion of plaintiff in error for judgment notwithstanding the verdict for the reason that said verdict is contrary to

the law and not sustained or justified by the evidence, by reason of the said matters and things all and singular, set forth in said foregoing Specifications of Error I-XIII both inclusive. (transcript p. 68).

XVI.

The Court erred in denying the motion of plaintiff in error for a new trial (transcript p. 68) by reason of said matters and things set forth in said Specifications of Error I-XV both inclusive, all and singular, and contained in said motion for new trial.

ARGUMENT

Specifications of Error I and II

MAY IT PLEASE THE COURT:

These two Specifications of Error may be best presented in conjunction, since the questions in both of them contained were brought before the trial Court for solution upon motions made by plaintiff in error for an instructed verdict at the two stages of the trial when such motions became in order, to-wit: When defendant in error had rested his case, and when both defendant in error and plaintiff in error had rested at the close of the evidence adduced at the trial.

These motions for an instructed verdict were based upon the matters and things contained in said Specifications of Error I and II, and in plaintiff in error's Assignments of Error (transcript pp. 73-81) and present for solution the following propositions, to-wit:

First Proposition

The Court erred in denying motions of plaintiff in error for an instructed verdict, for the reasons that defendant in error wholly failed to show that the accident which resulted in the death of the decedent, arose out of and in the course of, and was due to a condition or conditions of the occupation, employment, work or service in which said decedent was then and there engaged; or that such accident was due to or occasioned by any risk or danger inherent in or peculiar to such employment, occupation, work or service; or that said deceased was at work or engaged in his said employment, occupation, work or service at the time when such accident occurred or was by him sustained. (Specification of Error I, a, b; Specification of Error II, a, b, c.)

As we have pointed out in stating our case, this action was prosecuted under and defendant in error sought his remedy under "THE EMPLOYERS' LIABILITY LAW" of Arizona, (transcript p. 27) being Chapter Six, Title Fourteen, Revised Statutes Arizona, 1913 (Appendix to this Brief), enacted pursuant to Constitutional mandate contained in Sections 4, 5, 6, 7 and 8 of Article XVIII, of the Constitution of the State of Arizona (Appendix to this Brief).

There is no question of any conflict of any evidence adduced at the trial of this cause to establish the facts which at such trial were established. We are left to deal with these certain facts as they

were established by the evidence adduced by the defendant in error and the evidence adduced by the plaintiff in error, all of it in accord and not in conflict, and from these facts so established, ascertain the legal consequences therefrom and determine the legal result thereof.

All of this evidence is embodied in plaintiff in error's Bill of Exceptions (transcript pp. 38-53), and from it all it is established that the deceased came to his death from the following accident, sustained under the following circumstances, to-wit:

For a month and a few days prior to November 27, 1918, the deceased, Jose Maria Ochoa, was in the employ of plaintiff in error, New Cornelia Copper Company, at its mines at Ajo, Arizona, in the capacity of and in the occupation of a "driller" (transcript pp. 39, 45). On that date he left his place of residence to enter upon the performance of his duties at his place of work, at six thirty o'clock in the morning (transcript p. 40).

The time for the beginning of work by the deceased, in his said occupation as a "driller" was the hour of seven o'clock in the morning (transcript p. 41) and the place at which he was so engaged in his said occupation, was a quarry pit upon the premises of plaintiff in error, which was being excavated by the process of drilling, blasting and mining, and had in such process reached a depth varying from thirty to seventy-five feet (transcript pp. 40-41, 45-46) and it was the duty of de-

ceased, therein, to run a jackhammer and blast the rock formation in the usual process of mining.

Some time before the hour of seven o'clock in the morning, at which time the work of deceased in his said occupation, in his said capacity of "driller" was to begin, the deceased reached said premises of plaintiff in error, in the vicinity of the said quarry pit or excavation, (transcript pp. 50, 46, 40-41) and was there waiting for said hour of seven o'clock to arrive, at which time he was to enter upon the performance of his said duties (transcript pp. 40, 41, 50). This point where the deceased had so stationed himself was distant from the rim of the said quarry pit from thirty to forty feet (transcript pp. 40, 45-46) and from the place of work therein, of the deceased, about two hundred feet (transcript p. 46).

And at this point where deceased had so stationed himself, at the distance stated from his said place of work, for what purpose we know not, but of his own initiative and volition, and alone, deceased had built a fire, and there, at this fire was standing (transcript pp. 40-41) when the accident occurred which resulted in his death.

The evidence, without any conflict whatever, shows that the deceased had STEPPED ASIDE from the path or road leading to his place of work, in order to and for the purpose of lighting this fire. The eye witness Delgado says that deceased had built the fire about thirty-five or forty feet

to one side of the quarry hole, and ten or fifteen feet from the side of the road leading to the entrance to the quarry pit (transcript pp. 40, 42). The witness McHenry stated that the entrance where deceased would enter the quarry pit was about thirty feet away from the fire (transcript p. 48).

It is established by the evidence without any conflict whatever, that not only was it not customary for workmen to ever build fires upon the premises of plaintiff in error to warm themselves or for any other purpose, but that the building of fires by workmen for any purpose whatever upon the said premises was strictly by rule forbidden, and well known to be a prohibited act or practice. Specific instructions against such acts or conduct were existent and within the knowledge of employees generally. The witness Delgado stated that it was not customary for workmen to build fires to warm themselves before beginning work in the morning (transcript p. 41). The witness McHenry testified that it was not the duty of deceased to build fires to warm himself or for any other purpose, and that it was specifically requested of the workmen that they never light fires to warm themselves on the premises (transcript pp. 45, 47). The witness Brady testified that workmen were prohibited from building or lighting fires for the very obvious reason that lumber was kept piled within the premises of plaintiff in error (transcript p. 49) and that the instructions were not to allow fires anywhere around the works.

Immediately before the accident, deceased called to the eye witness Juan Delgado, a fellow driller in the quarry pit, saying:

"Come over near the fire; it is fifteen minutes yet to go to our work" (transcript p. 50).

This Juan Delgado, then proceeded to join deceased at the fire, in company with eight or ten other fellow workmen (transcript p. 40), and there they were all stationed when the accident occurred. The deceased had alone and unattended, built this fire (transcript p. 40) and thereafter, at his invitation, witness Delgado and the other fellow workmen had joined him (transcript pp. 50, 41, 42).

While this company of workmen were standing before this fire, so built by deceased, and at between ten and seven minutes before seven o'clock (transcript pp. 46, 41) and therefore, between ten minutes and seven minutes before the time had arrived for deceased, witness Delgado and other fellow workmen to enter upon the performance of their duties in the said quarry pit, and before any of them had actually begun to work, an explosion of powder, dynamite, or other explosive substance occurred (pp. 41, 45-46), which explosive substance was beneath the pieces or fragments of wood with which deceased had built his fire (transcript p. 41), which explosion took effect upon the person of deceased, and caused his immediate death.

What this explosive substance was, whether powder, dynamite or some other explosive sub-

stance, we do not know (transcript pp. 41, 43, 48). Plaintiff in error company used "gunpowder," "dynamite" and "other explosives" (transcript p. 41). The witnesses alternately called it "powder" and "dynamite" (transcript pp. 41, 42, 43, 48). Witness Delgado says the deceased never saw the explosive substance from which the explosion came that worked fatality to him, for the reason that it was CONCEALED under the wood which deceased had ignited and thus converted into a blazing fire, whereby the explosion came (transcript p. 41). Certainly, the explosive substance being thus CONCEALED, the witness Delgado never saw it, for had he discovered it or seen it prior to its explosion, he would have given some warning to his fellows, and to deceased. No one ever saw it, and no one knows what it was, whether gunpowder, dynamite, or some other explosive substance.

And, in like manner, no one knows how this explosive substance, whatever it was, came to be CONCEALED at this particular point upon the surface of the ground, away and distant from the work places of the employees, and from any place at which plaintiff in error company kept its explosives. It is established by the evidence (transcript pp. 41, 47, 48) that no explosive substance would ever be placed at the point where deceased met his death, to be used in the work of the mine.

The whole of the evidence is uncontradicted that never, in the history of the operation of plaintiff in error company, had explosive substance of any

nature been known to exist on top of the ground, or upon the surface of the premises (transcript pp 41, 43, 44, 46, 47, 48, 49). There had never been a surface explosion, nor had any explosive substance been encountered save in the actual handling of the same in the process of drilling and blasting, WHILE THE WORKMEN WERE ACTUALLY ENGAGED IN THE WORK OF DRILLING AND BLASTING.

A strict and uniform course of keeping and handling explosive substances existed and was in force by practice, rule and regulation, enforced and observed by all, and well known to all, at the premises and property of plaintiff in error company during all the time that deceased was in the employ of the plaintiff in error, and at all times theretofore and thereafter (transcript pp. 41, 43, 44, 46, 47, 48, 49).

The established practice and course, so existing by rule and regulation was the following, to-wit: All explosive substances were kept in a powder house, about three hundred feet from the place of accident, with a man in charge thereof, (transcript pp. 41, 46, 47, 48, 49) and any such explosives could only be obtained for use in the course of operation, by presenting an order, for the exact amount thereof, to be then and there used, to the keeper in charge of the powder house (transcript pp. 41, 46, 47, 48, 49). This order was an order from a "boss" or superior of the workmen, upon the keeper of the powder house, to deliver to any particular or in-

dividual workman, for present use, then and there, a certain and exact amount of such explosive substance, which was designed to be and was the exact amount of such needed for present use.

Upon delivery of any such quantity of explosive substance to any workman or workmen, pursuant to any such order, the said exact amount of such is duly recorded, with the number of the workman to whom the same is delivered, and if all said quantity of such explosive substance is not then and there used up in the purpose for which such order was given for it, the rule is and was uniform that any such quantity of such explosive substance should be then and there returned to the powder house (transcript pp. 43, 46, 48, 49) and the witness Delgado never knew of an instance in the course of his employment, that any unused quantity of explosive substance had not been in accordance with such rule, returned by the workman to the powder house. No witness at the trial knew of a single instance where any such unused portion of the explosive substance had not been so returned to the powder house (transcript pp. 43, 47, 49) and therefore, from the evidence, as far as we can ascertain the facts to be, there had never been such an instance of failure to return the unused portion of such explosive substance. As we have seen, there had never been a surface explosion prior to the accident in question, nor had there ever been known to be or exist any explosive substance whatever upon the surface of the premises or property of

plaintiff in error company, or anywhere else, save in the powder house, and in the possession of workmen, ACTUALLY ENGAGED IN THE WORK OF DRILLING AND BLASTING, and then, only that quantity of such explosive substance, then and there necessary to be used in such work, withdrawn regularly for such purpose under the rules and regulations aforesaid, and if any unused portion thereof remained, the same was INVARIABLY returned to the powder house and its keeper.

Such was the accident which resulted in fatality to deceased, according to the whole of the evidence adduced at the trial, which evidence is wholly without any conflict whatever between the testimony on behalf of defendant in error and that on behalf of plaintiff in error, as to any of the foregoing facts set out.

After the occurrence of said accident, the time having arrived for entering upon the performance of their duties, the fellow workmen of deceased, present at the accident, including the witness Delgado, went to work (transcript p. 41), which would have been the time for deceased to enter upon the performance of his duties had he not sustained the said accident.

As heretofore called to the attention of the Court, defendant in error set out in the complaint for recovery for the death of deceased, resulting from the accident aforesaid, two distinct causes of action therefor, one being the certain cause of

dividual workman, for present use, then and there, a certain and exact amount of such explosive substance, which was designed to be and was the exact amount of such needed for present use.

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plaintiff in error company, or anywhere else, save in the powder house, and in the possession of workmen, ACTUALLY ENGAGED IN THE WORK OF DRILLING AND BLASTING, and then, only that quantity of such explosive substance, then and there necessary to be used in such work, withdrawn regularly for such purpose under the rules and regulations aforesaid, and if any unused portion thereof remained, the same was INVARIABLY returned to the powder house and its keeper.

Such was the accident which resulted in fatality to deceased, according to the whole of the evidence adduced at the trial, which evidence is wholly without any conflict whatever between the testimony on behalf of defendant in error and that on behalf of plaintiff in error, as to any of the foregoing facts set out.

After the occurrence of said accident, the time having arrived for entering upon the performance of their duties, the fellow workmen of deceased, present at the accident, including the witness Delgado, went to work (transcript p. 41), which would have been the time for deceased to enter upon the performance of his duties had he not sustained the said accident.

As heretofore called to the attention of the Court, defendant in error set out in the complaint for recovery for the death of deceased, resulting from the accident aforesaid, two distinct causes of action therefor, one being the certain cause of

action existing under the provisions of Chapter Six, Title Fourteen, Revised Statutes of Arizona, 1913, known as the "EMPLOYERS' LIABILITY LAW," being a statutory action, and the other being the usual and ordinary action existing generally in the absence of a particular statutory action, for wrongful death due to negligence of plaintiff in error.

Defendant in error elected to prosecute his action under the said "EMPLOYERS' LIABILITY LAW" and thereunder did so prosecute it.

It therefore becomes our enquiry in this cause to determine whether or not defendant in error brought himself within such "EMPLOYERS' LIABILITY LAW" and established a right to recover thereunder.

The "EMPLOYERS' LIABILITY LAW" of Arizona is contained in said Chapter Six, Title Fourteen, Revised Statutes of Arizona, 1913, being Sections 3153-3162 thereof, which was enacted pursuant to Constitutional Mandate appearing in Article XVIII, of the Constitution of the State of Arizona, Sections 4, 5, 6, 7 and 8 thereof, all of which provisions are set out in the Appendix to this Brief, to all and singular of which, reference is hereby made and will be made throughout.

Examination of the provisions of such EMPLOYERS' LIABILITY LAW, and the provisions of the Constitutional Mandate preceeding it, discloses that in two particulars and in two respects, it is **sui generis**, and wholly anomalous with respect to and

in comparison with all other existent legislative enactments in the field of Workmen's Compensation and Employers' Liability legislation. In these two respects and particulars, it stands alone, has no counterpart, and is wholly foreign to all known such legislative enactments, in that:

The EMPLOYERS' LIABILITY LAW of Arizona, imposes upon an employer, in certain defined hazardous occupations, in all cases wherein the injury or death of an employee "Shall not have been caused by the negligence of the employee killed or injured," absolute, UNLIMITED liability for injuries or death sustained by employees therein engaged, at the will of the jury, but restricts recovery thereunder, to injuries or death sustained by such employees, due to "accident arising out of and in the course of such labor, services, and employment, AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT"—

> Constitution of Arizona, Article XVIII, Sec. 7, Chapter Six, Title Fourteen, Revised Statutes of Arizona, 1913, Sections 3153, 3154, 3155, 3156, 3157, 3158, 3159 thereof.

(Appendix)

With the validity or constitutionality of the foregoing enactments, we need not be concerned in this enquiry, for such has been determined.

Inspiration Co. vs. Mendez, 19 Ariz. 151.

Superior & Pittsburgh C. Co. vs Tomich, 19 Ariz. 182.

Arizona Copper Co. vs Hammer, etc. 63 L Ed. 636.

We may not now challenge the right of a legislative body to leave the determination of liability both as to its existence and its quantum or assessment to ARBITRARINESS, and fix it absolute and without limit, upon an employer in hazardous occupations in the absence of any fault whatever upon the part of such employer, whatever violence be deemed to thus be worked to the established canons of jurisprudence as the same have heretofore always been held to exist. For this has been done, and received the highest of judicial sanction, and it is now established that thereby no constitutional right is violated or infringed.

Arizona Copper Company vs. Hammer, 63 L. Ed. 636.

Inspiration Copper Co. vs. Mendez, 19 Ariz. 151.

Superior & Pittsburgh C. Co. vs. Tomich, 19 Ariz. 182.

Whether we believe with Mr. Justice McKenna, Mr. Justice McReynolds, Mr. Justice Van Devanter and The Chief Justice of the Supreme Court of our land that—

> "Until now I had supposed that a man's liberty and property—with their essential incidents—were under the protection of our charter, and not subordinate to whims or caprices or fanciful ideas of those who happen for the day to constitute the legislative majority. The contrary doctrine is revolutionary and leads straight towards destruc-

tion of our well-tried and successful system of government. Perhaps another system may be better—I do not happen to think so—but it is the duty of the Courts to uphold the old one unless and until superseded through orderly methods."

and

"Here, without fault, the statute in question imposes liability is some aspects more onerous than either the New York or Washington law prescribed; and the grounds upon which we sustained those statutes are wholly lacking. The employer is not exempted from any liability formerly imposed; he is given no quid pro quo for his new burdens; the common law rules have been set aside without a reasonably just substitute; the employee is relieved from consequences of ordinary risks of the occupation and these are imposed upon the employer without defined limit to possible recovery, which may ultimately go to non-dependents, distant relatives, or, by escheat to the state; 'the act bears no fair indication of a just settlement of a difficult problem affecting one of the most important of social relations;' on the contrary, it will probably intensify the difficulties."

Arizona Copper Company vs. Hammer, 63 L. ed. 636 dissenting opinion of Mr. Justice McReynolds, pages 652, 653 thereof;

Or whether we agree with Mr. Justice Pitney, Mr. Justice Holmes, Mr. Justice Day, Mr. Justice Clarke and Mr. Justice Brandeis, that imposition of unlimited absolute liability in the absence of fault violates no constitutional right, as it is laid down in the majority opinion in the Hammer case, supra, it is for us settled that such legislation is invulner-

able and must stand, and we have no quarrel with the judicial determination of this question, as it stands adjudicated in said Hammer case, and the Mendez and Tomich cases from the Supreme Court of Arizona, already cited, in spite of the strong dissent expressed by Mr. Justice Ross.

BUT, MAY IT PLEASE THE COURT—When the Constitution making body of the State of Arizona, and the legislature of that State, in the field of industrial law making, saw fit to impose this absolute, UNLIMITED liability, in the absence of any fault whatever, upon the part of an employer in the hazardous occupations, and cast the employer before a jury stript of all defense, save the right to diminish recovery by showing contributory negligence, and the right to bar recovery by showing the injury or death to have been caused by the sole negligence of an employee.

Section 3159, Revised Statutes Arizona, 1913,

Calumet & Arizona M. Co. vs. Gardner, 187 Pac. 563, thus and thereby transcending and exceeding all the limits theretofore set up to legislative prerogative, and so going to lengths and attaining an extremity unknown to canons and principles of jurisprudence within or without industrial perspective, it likewise saw fit to RESTRICT in and by the express terms and verbiage of its said enactments, any such recovery to and for injuries and death resulting from

> "accident arising out of and in the course of such labor, services and employment, AND

DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT";

And, well may we say that the constitution making body, and the enacting legislature had it in mind, in imposing this peculiar statutory liability and burden, **sui generis,** to restrict and hold within certain limits and bounds then and there in its contemplation, such burden and liability, and restrict its application to certain injuries present in the defined hazardous occupations, and to none others. For both the constitution making body and the enacting legislature declare that this anomalous liability, without a counterpart, and **sui generis**, exists and is imposed for injury or death due to

> "Accident arising out of and in the course of such labor, services and employment, AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT"

Constitution of Arizona, Article XVIII, Sec. 7
Section 3158, Revised Statutes Arizona, 1913.

In the Workmen's Compensation Acts, generally, in Employers' Liability Laws, generally, and through the whole field of industrial legislation, we find the provisions—

> "Arising out of and in the course of the employment."
>
> "Arising out of or in the course of the employment."

In no existent provision of constitutional or leg-

islative enactment, known to jurisprudence, in or out of industrial legislation, save and except in the aforementioned Section 7 of Article XVIII of the Arizona Constitution, and in the aforementioned sections of the said EMPLOYERS' LIABILITY LAW of Arizona, is there found or has there ever been incorporated the further restrictive provision:

> "AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT."

There, and there alone it exists, **sui generis** and without a counterpart in all the world.

No other enactment will or can be laid before this Court by defendant in error or any other litigant, with this provision in it, for there is no such. and as this Court proceeds to examine the authorities cited in this cause by the defendant in error, it must bear in mind, that in each and every case thus presented, the enactment in such case being construed or interpreted, is an enactment of the type form, there being slight variations encountered, in which the foregoing provision found in the Arizona enactments, "and due to a condition or conditions, etc," does not appear and in which the same never had existence, but invariably therein will be found the usual provisions, "arising out of and, or in the course of, etc."

The constitution making body and the enacting legislature of Arizona were not engaged in word badinage when they added to the usual said pro-

visions, in the CONJUNCTIVE, the further and restrictive language, "AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT." Something was in mind and in contemplation. This was not a mere and vain word composition upon the part of the lawmakers, inserted for the speculations of enquiring minds, but, a legal purpose was in view, and a differentiation was accomplished, distinguishing and differentiating the enactment in a controversy from all other existent industrial legislative enactments.

Arizona Eastern R. R. vs. Mathews, 180 Pac. 159.

It is conclusive that this purpose to so differentiate the enactment in controversy was in the minds of and in contemplation of the enacting legislature, for it contemporaneously produced and enacted a Workman's Compensation Act, at the same time, the same being:

> Chapter Seven, Title Fourteen, Revised Statutes Arizona, 1913, Sections 3163-3179 thereof,

and we would call the Court's attention to Sections 3164 and 3169 thereof (Appendix), wherein and whereby recovery exists thereunder, for injuries due to—

> "'Accident arising out of and in the course of such labor, service or employment"

obviously an enactment in such industrial legislation of the type form, already adverted to in this discussion, and we note that from such, and clearly,

designedly and purposely, the legislature OMITTED the said further restrictive provision,

> "AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT,"

And thus, we see that the State of Arizona has the usual type form Compensation Act, and as we have seen, the State of Arizona has its further and additional EMPLOYERS' LIABILITY LAW, to which it superadded the said further foregoing restrictive provision.

We are in consequence, impelled to this conclusion reached, and we submit, that the minds of reasonable men can not legally differ as to it.

The Supreme Court of the State of Arizona reached the same conclusion, and apparently from the same legal considerations.

Arizona Eastern R. R. vs. Mathews, 180 Pac. 159.

Not only would this conclusion result from these restrictive words themselves, if nothing else appeared, but we see that it was clearly in the minds of the legislators as they framed this EMPLOYERS' LIABILITY LAW, for in it they unequivocally say in Section 3155 thereof, Revised Statutes Arizona, 1913, that it contemplates recovery for injuries coming from and resulting from matters and things "INHERENT IN" the designated hazardous employments and which are "UNAVOIDABLE BY" the workmen in such occupations, and

therefore, recovery is not contemplated for every and all injury sustained by an employee in such occupations, particularly are those injuries not contemplated to be recovered for which are AVOIDABLE by the workmen, or are not due to and caused by matters and things NOT INHERENT in the particular occupation, but which could occur to workmen in other classes of occupations or employments, and so we have the above stated restrictive provision, added in the conjunctive, to-wit: "AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT."

And such conclusion would almost of necessity have to follow, if we were left with but the express restrictive provision quoted to deal with, for the elementary canon of statutory construction, that an enactment in derogation of the common law must take a strict construction when its application is invoked, demands that this conclusion be reached. And as we have seen from the Hammer case, suppra, 63 L. Ed. 636, no enactment yet has gone to such extremity in derogation of the common law and its principles. The principle stated is of course elemental.

36 CYC, 1178, et seq. and authorities.

All of which, the Supreme Court of Arizona, in construing this EMPLOYERS' LIABILITY LAW, is well aware of, and naturally arrived at this same conclusion, as we see in its decision in—

Arizona Eastern R. R. vs. Mathews, 180 Pac. 159
The Court says: Pages 162-163:

> "The meaning of the phrase 'caused by an accident due to a condition or conditions of such occupation,' appearing in the Constitution (Section 7, Art. 18), and next in the Liability Act (Paragraph 3154), as descriptive of the kind of accident intended to give rise to a right of action to an injured employee, has not yet been construed by the Court. THE EXPRESSION IS ORIGINAL IN OUR CONSTITUTION AND LAWS. We have not been able to find it in any of the compensation or liability laws or in any decision of a Court, or in any text book, and it necessarily follows that it has not been defined or applied. It is evident that the accident must arise out and also be INHERENT in the occupation ITSELF; the condition or conditions that produce the accident must INHERE in the occupation. If the occupation is non-hazardous, if the condition or conditions inherent therein are innocuous, the occupation and the employee therein are outside of the purview of the Constitution and likewise of the Liability Law. The legislature, in paragraph 3155, has defined the kind of accident intended by it to be covered by the Employers' Liability Act in the following language:
>
> > 'By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are INHERENT in such occupations and which are UNAVOIDABLE by the workmen therein.'

It would seem that before an employee may recover for injury under this act, it must have occurred WHILE HE WAS AT WORK IN HIS OCCUPATION, and it must have been occasioned by a risk or danger INHERENT in the occupation.

Our statute (paragraph 3158) requires SOMETHING MORE than that the 'accident arise out of and in the course of the employment,' an expression common to most of the liability and compensation laws; our statute being:

> 'When in the course of work in any of the employments or occupations enumerated in the preceeding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATIONS OR EMPLOYMENT.'

These added words to the common expression MUST MEAN SOMETHING. The words 'arising out of' have been construed to refer to the origin or cause of the injury, and the words 'in the course of' to refer to the time, place and circumstances under which it occurred. Workmen's Compensation Acts, p. 72, Corpus Juris. SUPERADDED to these under our Liability Act is the requirement that the injury must have occurred in the 'work,' 'labor,' 'service' and 'employment' and be 'DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION.' The act of appellee IN GOING AWAY FROM HIS WORK FOR REFRESHMENTS was, it may be granted, proper and necessary; but it is also equally as apparent that during the time of his absence HE WAS

NOT RENDERING WORK, SERVICE OR LABOR for appellant, AND THEREFORE THE INJURY HE SUSTAINED WHILE ON SUCH ERRAND WAS NOT DUE TO A CONDITION OR CONDITIONS OF HIS OCCUPATION. Under our statute, the work must be hazardous, and the injury must have been incurred because of the hazard or danger in the work itself and, because of said hazard, 'UNAVOIDABLE' on the part of the employee. Calumet & Arizona M. Co. vs. Chambers, 20 Ariz., 176 Pac. 839.

The danger of falling into the scale pit was not peculiar to appellee in his occupation of bill clerk. It was a danger to which persons not employees of appellant were exposed as much as those engaged in the service of appellant. Appellee shows by his complaint and by the testimony of himself and others that the scale pit into which he fell was 'along the route usually traveled by himself and others having business in and about defendant's freight depot.' This being so, it was not a risk or hazard peculiar to his work, but one 'common to the neighborhood.' In Re Nichol, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916 A 306."

Now, if the present action was the usual action brought under the aforementioned type form Compensation or Liability Act, the right of defendant in error to even then recover, does not appear upon the evidence. Mere injury sustained while an employee is traveling to the place of work, or even after he has arrived upon the premises of the employer, or there, in the vicinity of the place of work does not establish the right to recover.

Honnold on Workmen's Compensation, Section 107-109,

Dawbarn, Employers' Liability and Workmen's Compensation, Fourth Edition, page 118.

Boyd on Workmen's Compensation, Section 186,

Harper on Workmen's Compensation, Section 34,

Bradbury on Workmen's Compensation, Vol. 1, page 404.

Hills vs. Blair, 148 N. W. 243.

Smith vs. L. & Y. Rly. 15 T. L. R. 64.

Reed vs. G. W. Rly. 99 L. T. 781.

Williams vs. Coal & Iron Co. 3 B. W. C. C. 65.

Hoskins vs. Lancaster, 3 B. W. C. C. 476.

When in such situation, such employees proceeds to divert his acts into a course or channel of conduct disconnected from his occupation or employment, and not incidental thereto nor incident to his presence there for the purpose of entering upon the performance of his duties in such occupation or employment, but on the contrary, to the accomplishment of some distinctively personal and individual purpose of his own, there being no association or connection between the act so being undertaken and accomplished for such personal or individual purpose and the occupation or employment and the incidents thereof, then, by the soundest of judicial decision, there can be no recovery, and injury or accident so encountered is held not to arise out of or in the course of such occupation or employment of the employee.

And when it appears that an employee so situated, to accomplish the personal or individual purpose, steps aside from the usual avenue of ingress or egress to and from his place of work, and proceeds to do or perform such act or acts in violation of rules and regulations or customs applicable to him as an employee, it is settled that there may be no recovery, and injury or accident by such employee sustained does not arise out of or in the course of the occupation or employment of such employee.

Byram vs. I. C. R. R., 154 N. W. 1006.
Moore vs. Iudustrial, etc., 172 Pac. 1114.
Hills vs. Blair, 148 N. W. 243.
Healy vs. Cockrill, 202 S. W. 229.
Eakin's Adm'r. vs. Anderson, 183 S. W. 217.
Borogad vs. Dix, 172 NYS 489.
Hill vs. Staats, 187 S. W. 1039.
Symington vs. Sikes, 88 Atl. 134.
Hardy vs. At. R. R., etc., 93 S. E. 18.
Hobbs vs. Gt. N. R. R., 142 Pac. 20.
C. N. O., etc. R. R. vs. Wilson, 171 S. W. 430.
Van Nostrand vs. N. P. R. R., 151 Pac. 89.
N. W. Pac. R. R. vs. Indus. Com., 163 Pac. 1000.
Ames vs. N. Y. C. R. R., 165 NYS 84.
In re Betts, 118 N. E. 551.
Murphy vs. Steel Co., 169 NYS 781.
Lumber Co. vs. Indus. Com., 167 N. W. 453.
Const. Co. vs. Indus. Com., 122 N. E. 113.
Spooner vs. Detroit Co., 153 N. W. 657.
De Voe vs. N. Y. St. R. R., 155 NYS 12.
Hopkins vs. Sugar Co., 150 N. W. 325.
Newman vs. Newman, 155 NYS 665.

Fumiciello's case, 107 N. E. 349.
Bischoff vs. Car Co., 157 N. W. 34.
Mann vs. Knitting Co., 96 Atl. 368.
Clark vs. Clark, 155 N. W. 507.

And, within the foregoing principles, and class of adjudications just enumerated, comes and properly belongs the case at bar.

For the evidence without conflict establishes, as we have heretofore seen, that the deceased at the time of the accident, was not engaged in any of the duties of his employment or occupation, but had arrived on the premises of the employer, in the vicinity of the quarry pit within which it was his duty to work as a driller, some time before the time had arrived for him to begin work (transcript pp. 50, 46, 40-41), when he STEPPED ASIDE from the path or road leading to the quarry pit, his place of work being within such quarry pit, and ten or fifteen feet OFF the path or road, thirty-five or forty feet distant from the rim of the quarry pit, and two hundred feet distant from the place of work of deceased within the quarry pit (transcript pp. 40, 42) and there alone, built a fire and at such fire was standing when the accident occurred (transcript pp. 40-41) which resulted in his death. The building of fires by workmen upon the premises not only was not customary, but the same was contrary to instructions given to the workmen (transcript pp 41, 45, 47, 49). Fifteen minutes before the time for deceased to enter upon the performance of his duties as a driller, he called to a fellow work-

man to join him at the fire (transcript p. 50) and between ten minutes and seven minutes before such time to go to work the accident occurred at the fire (transcript pp. 41, 45-46).

It is obvious that the conduct and acts of deceased were wholly foreign to any duty or duties of his occupation or employment, and to any of the incidents thereof. The same were not incident to his presence at the time and place, preparatory to going to work, but the same did uneqivocally constitute the going upon "a journey of his own" to accomplish a distinctively personal and individual purpose of his own, and if indeed he was cold in the early morning, nothing in or incident to his occupation or employment or any duties therein, called for him to build a fire upon the surface of the ground to warm himself. There was no association or connection between the acts of deceased in building this fire and his occupation or employment or any duty or duties thereof, but on the contrary, the same constituted a departure therefrom, and a breach thereof, contrary to custom observed by and instructions given to the workmen.

AND THIS IS SETTLED, which disposes of the question under discussion, that where, as is established by the uncontroverted evidence and the undisputed facts hereinbefore set up in the evidence, AT THE TIME OF THE INJURY, THE EMPLOYEE IS ENGAGED IN A VOLUNTARY ACT NOT ACCEPTED BY, OR KNOWN TO HIS EM-

PLOYER, AND OUTSIDE OF THE DUTIES FOR WHICH HE IS EMPLOYED, THE INJURY CANNOT BE SAID TO BE IN THE COURSE OF OR ARISING OUT OF THE EMPLOYMENT, AND HENCE, WHERE THE INJURY IS DUE TO THE ACT OF THE EMPLOYEE OUTSIDE OF HIS DUTIES, THOUGH FOR THE MUTUAL CONVENIENCE OF THE EMPLOYER AND THE EMPLOYEE (which does not appear in the evidence in this case), HE MUST SHOW THAT THE ACT WAS DONE WITH THE KNOWLEDGE AND ASSENT OF THE EMPLOYER.

Workmen's Compensation Acts, CORPUS JURIS, page 82.

Clark vs. Clark, 155 N. W. 507.

Spooner vs. Detroit Co., 143 N. W. 657.

De Voe vs. N. Y., etc., Ry., 155 NYS 12, 113 N. E. 256.

Lowe vs. Pearson, (1899) 1 Q. B. 261, 1 WCC 5.

Dougal vs. Westbrook, 6 B. W. C. C. 705.

Whiteman vs. Clifden, 6 B. W. C. C. 49.

Smith vs. Morrison, 5 B. W. C. C. 151.

McDaid vs. Steel, 4 B. W. C. C. 412 (1911) S. C. 859.

Kerr vs. Baird, 4 B. W. C. C. 397 (1911) S. C. 701.

Cronin vs. Silver, 4 B. W. C. C. 221.

Jenkinson vs. Harrison, 4 B. W. C. C. 194.

Weighill vs. Coal Co., 4 B. W. C. C. 141.

Whelan vs. Moore, 2 B. W. C. C. 114.

McAllan vs. Council, 8 F (ct. Sess.) 783.

McHenry vs. Ry., S. C. 732 (1907).

Edwards vs. Coal Co., 5 W. C. C. 21.
Losh vs. Evans, 5 W. C. C. 17, 19 T. L. R. 142.

The explosive substance from which came the accident was CONCEALED beneath the wood from which deceased built his fire (transcript p. 41). It is not even know what it was. Deceased did not encounter it at his place of work within the quarry pit, nor in the usual course of handling explosives in his occupation, but at a point OFF the path or road leading to his place of work, to which point he had journeyed to build his fire. Whatever this explosive substance was, no connection between it and plaintiff in error company is made in the evidence. Never before had any explosive been known to exist upon the surface of the premises, anywhere (transcript pp. 41, 43, 44, 46, 47, 48, 49), and in the operation of plaintiff in error company, no explosive would ever have been placed at the point where the fire was built. There had never been a surface explosion. All explosives were kept in a powder house at or in the workings of the mine, and could only be gotten upon an order for the specific amount to be presently used, and the unused portion thereof returned straightway to the keeper of the powder, and no one ever had knowledge of any instance where any such unused portion of explosive had not been so returned (transcript pp. 43, 46, 47, 49, 41, 44, 48).

We respectfully submit that under the foregoing undisputed facts, the authorities submitted and the principles therefrom existing, that there can

be no recovery and could be no recovery under any known Compensation or Liability Act of the foregoing mentioned type form and that upon any sound theory the accident in controversy can not be said to have arisen out of or in the course of the occupation or employment in which deceased was engaged, even though we omit from all consideration the EMPLOYERS' LIABILITY LAW OF ARIZONA, under which the present action is brought and which alone must determine our enquiry.

Now, we have seen that the enacting legislature SUPERADDED to the said EMPLOYERS' LIABILITY LAW, a further restrictive provision, **sui generis,** unknown to and not found in any existent industrial legislation, whether compensatory of liability in its nature, in the following terms:

"AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT."

The Supreme Court of Arizona in construing this enactment says in the determinative case of—

Arizona Eastern R. R. vs. Mathews, 180 Pac. 159, page 162:

> "Our statute (paragraph 3158) requires SOMETHING MORE than that the 'accident arise out of and in the course of the employment,' an expression common to most of the liability and compensation laws; our statute being:
>
> 'When in the course of work in any of

> the employments or occupations enumerated in the preceeding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, AND DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION OR EMPLOYMENT.'

These added words to the common expression MUST MEAN SOMETHING.

It is evident that the accident must arise out of and also be INHERENT in the occupation ITSELF; the condition or conditions that produce the accident must INHERE in the occupation.

It would seem that before an employee may recover for injury under this act, it must have occurred WHILE HE WAS AT WORK IN HIS OCCUPATION, and it must have been occasioned by a risk or danger INHERENT in the occupation.

The act of appellee IN GOING AWAY FROM HIS WORK FOR REFRESHMENTS was, it may be granted, proper and necessary; but it is also equally as apparent that during the time of his absence HE WAS NOT RENDERING WORK, SERVICE OR LABOR for appellant, AND THEREFORE THE INJURY HE SUSTAINED WHILE ON SUCH ERRAND WAS NOT DUE TO A CONDITION OR CONDITIONS OF HIS OCCUPATION.

Under our statute, the work must be hazardous, and the injury must have been incurred because of the hazard or danger in the work ITSELF and, because of said hazard, UNAVOIDABLE on the part of the employee.

> Appellee shows by his complaint and by the testimony of himself and others that the scale pit into which he fell was 'along the route usually traveled by himself and others having business in and about defendant's freight depot.' This being so, it was not a risk or hazard peculiar to his work, but one 'common to the neighborhood.' In Re Nichol, 102 N .E. 697."

From which it is clear that the condition or conditions which produce the accident, must be inherent in and inhere in the occupation itself in which the employee is engaged, and at the time such accident is sustained, such employee must therefore be actually at work in such occupation, and engaged in the performance of its duties. In the present case, the employee was not engaged in the performance of any duties in or incident to his occupation of a driller, but before the time to go to work, in the vicinity of the place of work, all of which we have seen in the evidence, he had STEPPED ASIDE from the road or path leading to the place of work, to accomplish the purely personal end and purpose of building a fire off the road side for his individual and personal comfort, some fifteen minutes before the time to go to work, contrary to custom, and instructions to workmen.

Obviously, nothing INHERENT in the occupation of driller necessitated the building of a fire at the time and place of the accident, however proper it might be for the deceased to have regard for his personal warmth and comfort. There is nothing to show that even had be gotten a little

chilled or cold, any danger or menace thereby threatened or confronted him, calling for him to leave the road or path to his place of work and build the fire.

Suppose the climatic condition had been reversed at the time and place of the accident, and instead of deceased encountering chill in the atmosphere, he had encountered heat instead, and that flowing through the premises there was a stream. That deceased STEPPED ASIDE from the road leading to the place of work, and OFF the road, at a like distance as the point where he built the fire, a short while before the time had arrived for him to go to work in the quarry pit, he undertook to cool himself in the stream, and owing to the current or depth of the waters, he sustained death by drowning. Would this accident be one INHERENT in his occupation as a driller in the quarry pit, and did anything therein necessitate or call for him going into the stream for the purpose of cooling himself? And would not the danger existent in the depth of the stream or in its current exist to all other persons upon or passing through the premises, both to employees of the plaintiff in error company, and to persons not such employees as well who might be upon the premises in any capacity, or who might have access to the stream, and so, even as to trespassers?

The danger existent in concealed explosive at the point of the accident, on the surface of the ground, to persons building fires over the same

was not a risk or danger inherent in the occupation of deceased as a driller, for like the "scale pit" in the aforementioned Mathews case, such a danger existed to and confronted all persons whomsoever, who upon the said premises at the time and place of the accident, might ignite flames, or who at this very point where the accident occurred, might kindle fires for their personal comfort. Such a danger confronted any traveler passing through the premises and building such a fire, or any trespasser so conducting himself, and did not exist as to the deceased and his fellow workmen and none others. This danger existed as to any clerical employee passing through the premises on his way to work, or who might arrive a few minutes before his office or place of work was open to him, and wander about the premises during such interval. It existed in like manner to any drayman hauling through the premises who might halt at any point therein. It did not exist merely as to drillers in the quarry pit, and was no more inherent in the drilling occupation than in the bookkeeping occupation. This would not, we respectfully submit, seem to be argueable.

In Re Nichol, 102 N. E. 697.

However, the Supreme Court of Arizona holds that without regard to the purpose actuating an employee in taking himself out of actual performance of the duties of the particular occupation, the fact that he is not so engaged in the performance of the same when accident is sustained, is de-

cisive of the question we are concerned with, for as the Court points out, that during the time of absence from such performance, and by reason of such very absence, such employee is not rendering work, service or labor in such occupation or employment, and that in consequence, such accident can not be DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION. It is in consequence a legal impossibility to be doing something other than an act or acts in actual performance of the duties of the particular occupation, and suffer or sustain an accident DUE TO A CONDITION OR CONDITIONS OF SUCH OCCUPATION, and we respectfully submit that the deceased has not been and can not be brought within the provisions of said EMPLOYERS' LIABILITY LAW.

Calumet & Arizona M. Co. vs. Chambers, 20 Ariz. 56, 176 Pac. 839.

Ross vs. Kay Copper Company, 20 Ariz. 576, 184 Pac. 978.

And still another element, which under the said Mathews case, must concur with all and singular the elements aforementioned, or else the employee seeking to recover under the said EMPLOYERS' LIABILITY LAW must fail, is wholly lacking.

A hazard or danger in the work itself, UNAVOIDABLE upon the part of the employee, must have caused the accident in question. In the present case, the accident in question was not caused

by any hazard or danger whatever IN THE WORK ITSELF, for the deceased was not at work when he sustained the accident. He had not gone to work, but fifteen minutes at least, before the time for him to go to work, he had left the road leading to work, and off the road, distant from the place of work, he had alone, built a fire for his own purposes, and at this fire he was standing. This was not a situation UNAVOIDABLE BY HIM. He could have avoided it by continuing on the road to work, and arriving at the place of work, and if cold there, within the quarry pit, he might have sought shelter, or otherwise accomplished his personal comfort. He could also have avoided building a fire off the road side and avoided igniting a flame there. Any employee, driller or otherwise could have avoided such. This was nothing that was unavoidable by any employee or workman. In fact, it was prohibited by instructions to workmen and unknown to custom, all of which we have seen, and could have been and should have been avoided by all employees.

Such is the result coming from the said EMPLOYERS' LIABILITY LAW, its construction by the Supreme Court of Arizona, particularly with respect to its superadded restrictive provision now fully discussed and **sui generis**, and the whole of the evidence, unconflicting, establishing the undisputed facts hereinbefore laid before the Court. It is a necessary result, which could not, we earnestly and respectfully submit, be otherwise. The de-

ceased can not be and has not been brought within the purview or within the provisions of said EMPLOYERS' LIABILITY LAW, and the accident in question can not be said to have been DUE TO A CONDITION OR CONDITIONS OF THE OCCUPATION OR EMPLOYMENT of deceased.

And it follows, that the trial Court should have granted both said Motions for an instructed verdict made by plaintiff in error as and when the same were made.

The gravity of the situation in which defendant in error stood was well appreciated by the trial Court who said (transcript pp. 42, 43, 44):

> "Whether or not this accident was due to a condition of his employment is not very clear to me."
>
> "The testimony shows that it was not customary for the company to leave dynamite and powder, which was in use around the place where the employees congregated to wait the time to go to work—for the time when they were required to go to work. If the testimony showed that, it might be said that that was one of the conditions of the employment, or the situation surrounding it and might be such as to come within that definition, but I am somewhat in doubt as to whether the mere fact that that dynamite was placed there by some one, we don't know by whom, was one of the conditions of the employment, I will allow you to recall this witness or any other witness that may be present to the stand to enquire into that question".
>
> "I think I will overrule the motion. That

> is not a question for this Court to pass upon, I think, as requested by counsel. I think that I would do the plaintiff an injustice and I think I shall resolve the doubt in favor of the plaintiff."

Whereupon, to allow defendant in error to attempt to produce further testimony for the purpose of removing this doubt expressed by the Court, the witness Delgado was again called to the stand in the absence of the jury, and further effort was made, which effort elicited NOTHING FURTHER in this direction, and so, without anything further being elicited, the Court proceeded to nevertheless, resolve the doubt in favor of defendant in error (transcript pp. 43, 44, 45).

Yet, fearing to do an injustice to the plaintiff, upon the state of the evidence now before this Court, the Motions of plaintiff in error for an instructed verdict were denied.

We respectfully submit, that the error is patent, and earnestly say to the Court that the Motions for an instructed verdict properly should have been granted.

The foregoing errors occur throughout the instructions of the trial Court, as we will note when we reach that portion of the argument.

Specification of Error V

The Court erred in instructing the jury as set out verbatim, in said Specification of Error V, that if it should be found from the evidence that deceased had gone upon the property of plaintiff

in error eight or ten minutes before time to go to work, and was there waiting for the time to go to work, that deceased was engaged in a hazardous occupation under the Employers' Liability Law, and was rendering work, service and labor for defendant in error, regardless of the fact that he had not gone down into the mine to work.

We have in detail reviewed the unconflicting evidence and undisputed facts established thereby. The error of this instruction is now evident. The instruction does not meet or conform to these undisputed facts established, which are that deceased for a purpose of personal comfort, STEPPED ASIDE from the avenue of approach to his place of work, and OFF the same, some ten or fifteen feet, and thirty-five or forty feet from the rim of the quarry pit which was the work place, and two hundred feet distant from the work place of deceased, within such quarry pit, built a fire, all prior from fifteen to seven minutes to the time at which deceased would have actually gone to work had the accident not occurred to him. He never reached the place of work and never went to work. He built the fire alone, and in disregard of custom and against instructions generally given to workmen. The accident came from an explosion from some explosive CONCEALED by whom no one knows, and what the explosive was is not known. No connection between it and defendant in error exists in the evidence. All explosives were kept according to strict rules and rigid practice hereinbefore de-

tailed at length, in known depositories, and were never known to have existed or to have been present at the place of the accident or any like place, and had never been encountered save in the usual course of actual drilling and mining.

Upon such facts, such an accident can not even be said to arise out of or in the course of the occupation or employment, as we have seen from the authorities heretofore cited under a foregoing division of our argument, to which the attention of the Court is again respectfully directed.

However, the Supreme Court of Arizona has disposed of this particular instruction in the case of—

Arizona Eastern R. R. vs. Mathews, 180 Pac. 159, and also

Calumet & Ariz. M. Co. vs. Chambers, 20 Ariz. 54, 176 Pac. 839.

Ross vs. Kay Copper Co., 20 Ariz. 576, 184 Pac. 978.

Whereby, it appearing that an employee at the time of the accident IS ABSENT from his work, service and labor in his occupation or employment, he is not, and cannot be rendering work, service and labor therein, as erroneously stated in this instruction complained of, to the jury. Whether such absence comes by way of the employee not yet having reached the place of work and, therefore, not having entered upon the performance of his duties in such employment or occupation, or by way of

such employee having taken himself out of his work temporarily after having actually theretofore been engaged in his work, service or labor amounts to naught.

However hazardous the occupation might be, the deceased, in this case, was not engaged in it when he sustained the accident, and the error of the instruction complained of is obvious.

Specification of Error VI and VII.

The instructions contained in these two Specifications of Error are open to the same exceptions taken to that under foregoing Specification of Error V, and in giving the same, the trial Court worked the same errors as in said Specification of Error V.

Specification of Error VIII.

The Court erred in giving the two qualifying instructions in this Specification of Error contained, since such qualifications amount to and constitute a statement to the jury by way of instruction, that deceased was rendering work, service and labor for his employer by merely being upon the premises of the employer preparatory to going to work in his occupation a short interval of time before it was time to begin work, within the meaning of the said EMPLOYERS' LIABILITY LAW, and that therefore, an accident occurring to such employee so situated, is and was an accident due to a condition or conditions of the occupation or employment of such employee. This is manifest error

under the undisputed facts established by the uncontroverted evidence, and the aforementioned Mathews, Chambers and Kay Copper Company cases.

We think further, that the language in which the trial Court couched the qualifying instructions go a long way indeed, being to the effect that it is the **"opinion"** of the Court that such employee so waiting for the time to come to go to work upon the premises of the employer is so rendering work, service and labor in his occupation or employment, and ought not to be approved.

Careful examination of this language (transcript pp. 57, 58) results in a conclusion that the trial Court practically and in effect instructed the jury to return a verdict for defendant in error upon all the facts and circumstances that had been adduced before it.

Specification of Error IX.

The Court erred in refusing the instruction requested and contained in this Specification of Error, for reasons which by this time are apparent. It is uncontradicted that the deceased did light the fire, and that to do so was an act outside of his work, service and employment. He had not yet entered upon the performance of the duties of his occupation or employment when he went aside to light the fire. He was not in his work, service or employment at this time and under the Mathews, Chambers and Kay Copper Co. cases, plaintiff in

error was entitled to the instruction requested.

Specification of Error XII.

Upon the undisputed facts established by the uncontroverted evidence, the instruction requested and set out in this Specification of Error was proper. An utter absence of connection between plaintiff in error company and the explosive referred to in the requested instruction exists from the said evidence.

Specifications of Error XIII, XIV, XV and XVI.

Each and all of these Specifications of Error are covered by our foregoing argument made and therefore need not be argued in repetition. We direct our argument to each and all of them and submit that all and singular they are well taken.

In the consideration of the questions presented for determination in this cause, the Court must bear in mind, that in all the authorities that will or can be presented by defendant in error, NOT ONE can or will be laid before the Court involving or in which is or has been considered an enactment in industrial legislation, either of the nature of a compensation or liability act, containing the original, and further restrictive provision that the injury for which recovery or compensation is provided, MUST BE DUE TO A CONDITION OR CONDITIONS OF THE OCCUPATION OR EMPLOYMENT, superadded, in the conjunctive, which alone is found in the said EMPLOYERS' LIABILITY LAW of Arizona.

All authority that can or will be presented is upon and under and involves the aforementioned TYPE FORM enactment in industrial legislation, of which the Federal Employers' Liability Law is an instance, remedial solely and exclusively as to injury sustained ARISING OUT OF OR IN THE COURSE OF THE EMPLOYMENT OR OCCUPATION.

And, all such authority is inapplicable to the present enquiry, and not in point, in consequence. This, the Supreme Court of Arizona, in the Mathews case clearly recognizes and so states expressly in its opinion, which it arrived at unaided by all such authority or any of it, as we are in like manner impelled to do in this case.

To the authorities heretofore presented estab lishing that upon facts such as the facts hereinbefore detailed, this particular accident is even an accident NOT arising out of or in the course of the employment or occupation under the TYPE FORM enactment in industrial legislation, many decisions can be and will be offered in opposition, and out of them all, this will appear—that each such decision has been arrived at by or through some peculiar facts or attendant circumstances peculiar to it, wherein or whereby the absence or cessation of the employee from his actual performance of duty in the occupation or employment was in furtherance of the interest of his employer, or of some incident thereto, or that the accident came from risk or danger attendant upon or incident to such

employee at the time and place of its occurrence to such employee, and as to him in such situation existed as a likely or possible danger or risk.

Upon examination of this class of authority, we are satisfied to rest upon the proposition that the best of judicial expression and the soundest of enunciated principle sustains the mass of authority heretofore submitted in support of this division of our argument, by which we should and ought to be directed and guided in reaching our determination of the questions herein presented.

There is this further—defendant in error need not have made effort to recover under said EMPLOYERS' LIABILITY LAW, and therefore have assumed the burden of bringing the deceased within its provisions and its purview, even though thereby he might be able to step from under the other burden of establishing negligence in plaintiff in error company, which confronted him in the event he pursued the action for wrongful death (transcript pp. 4, 5, 6).

For,

> "Under the laws of Arizona, an employee who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The Common-law liability relieved of the fellow-servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Const. Secs. 4, 5, Art. 18. (2) Employers' liability law, which applies to hazard-

> ous occupations where the injury or death is not caused by his own negligence. Const. Sec. 7, Art. 18. (3) The compulsory compensation law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const. Sec. 7, Art. 18."
> Smelting Company vs. Ujack, 15 Ariz. 382, 139 Pac. 465.

But, having determined to seek his recovery under said EMPLOYERS' LIABILITY LAW, he must bring himself within its purview and its provisions, and this he has wholly failed to do, as we have seen.

He had the right and opportunity to predicate the right of recovery upon the existence of negligence in plaintiff in error company as to the presence of the explosive substance at the place of the accident where deceased built his fire. And so, could have brought the usual action at common-law for the death of deceased. This, defendant in error elected NOT to do, but to pursue the remedy under said EMPLOYERS' LIABILITY LAW and thus he undertook to establish that the injury resulting in the death of deceased was caused by an accident with the other elements already discussed, due to a CONDITION OR CONDITIONS OF THE EMPLOYMENT OR OCCUPATION. Whether or not negligence exists in the employer, this element MUST EXIST. That it did not exist, we submit, we have conclusively shown.

The third possible remedy open in case of injury to an employee, The Compensation Act men-

tioned in the Ujack case, did not exist to this particular defendant in error, he being the administrator of the deceased employee.

Behringer vs. Mining Co., 17 Ariz. 232, 149 Pac. 1065.

Counsel desire to ask the indulgence of the Court for the detail and length of the foregoing presentation in argument, and submit in mitigation that the enactment under which the action is brought is a novel one in the several particulars hereinbefore discussed. Its validity has been sustained by a division in opinion of five to four in the highest tribunal in our land. Its application and construction is a thing of import by reason of its differentiation from all other known enactments in the field of industrial legislation, it being a departure from all such, hitherto unknown to jurisprudence, and therefore meriting the fullest consideration.

We have therefore endeavored to set before the Court the entire aspect of the present cause consequent upon an earnest endeavor to arrive at a sound solution of the questions presented, deeming the foregoing detailed argument upon the same necessary to that end.

And in conclusion we earnestly and respectfully submit that by reason of the patent errors of the trial Court hereinbefore in order set out and discussed in our argument, in accordance with our prayer for reversal (transcript p. 81), that the

judgment of the trial Court should and ought to be reversed, and its judgment ordered to be entered that this cause be dismissed.

RESPECTFULLY SUBMITTED,

.....

of Bisbee, Arizona.

.....

of Douglas, Arizona.

Attorneys for Plaintiff in Error, New Cornelia Copper Company, a Corporation

APPENDIX

Constitution—State of Arizona

ARTICLE XVIII.

Sec. 4. The common law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

Sec. 5. The defense of contributory negligence or of assumption of risk shall in all cases whatsoever, be questions of fact and shall, at all times, be left to the jury.

Sec. 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

Sec. 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or in any other industry the legislature shall enact an **Employers' Liability Law**, by the terms of which any employer, whether individual, association or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

Sec. 8. The Legislature shall enact a Workmen's Compulsory Compensation Law applicable to workmen engaged in manual or mechanical labor in such employments as the Legislature may determine to be especially

dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workmen from any accident arising out of, and in the course of such employment is caused in whole or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees to exercise due care, or to comply with any affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution .

EMPLOYERS' LIABILITY LAW

Revised Statutes Arizona, 1913

Chapter Six Title Fourteen

Sec. 3153. This chapter is and shall be declared to be an Employers' Liability law, as prescribed in Section 7 of Article XVIII of the State Constitution.

Sec. 3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said Section 7 of Article XVIII of the state constitution, any employer, whether individual, association or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such

employee shall not have been caused by the negligence of the employee killed or injured.

Sec. 3155. The labor and services of workmen at manual and mechanical labor in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risk and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

Sec. 3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows:

(1) The operation of steam railroads, etc.

* * * * * * * *

(8) All work in and about quarries, open pits, open cuts, mines, ore reduction works and smelters.

* * * * * * * *

(10) All work in mills, shops, works, yards, plants and factories where steam, electricity or any other mechanical power is used to operate machinery and appliances in and about such premises.

Sec. 3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations and instructions inform

all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

Sec. 3158. When in the course of work in any of the employments or occupations enumerated in the preceeding section, personal injury or death by any accident arising out of and in the course of such labor, services and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents, and if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative, for the benefit of the estate of the deceased.

Sec. 3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in Section 5 of Article XVIII of the state constitution; provided, however, that in all actions brought against any employer,

under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

Sec. 3161. In all actions for damages brought under the provisions of this chapter, if the plantiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 percent. per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

WORKMEN'S COMPENSATION ACT

Revised Statutes Arizona, 1913

Chapter Six, Title Fourteen, Sections 3164, 3169.

Sec. 3164. Compulsory compensation shall be paid by his employer to any workman engaged in any employment declared and determined as in the next section hereof, (as provided in Sec. 8, of Article XVIII of the State Constitution) to be especially dangerous, whether said employer be a person, firm, association, company, or corporation, if in the course of the employment of said employee personal injury thereto from any ac-

cident arising out of and in the course of, such employment, is caused in whole, or in part or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee or employees, to exercise due care, or to comply with any law affecting such employment.

Sec. 3169. When, in the course of work in any of the employments described in the third section above, personal injury by accident arising out of and in the course of such labor, service, or employment, is caused to or suffered by any workman engaged therein, by any risk or failure specified in section 66 (Par. 3164) hereof, then such employer shall be liable to and must make and pay compensation to the workman injured, and his personal representative, when death ensues, for the benefit of the estate of the deceased, for such injury at the rates and in the manner hereinafter set out in this chapter.